United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7551

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IN THE
UNITED STATES COURT OF APPEALS
For The Second Circuit

Docket #75-7551

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,
Plaintiff-Appellant

-vs-

WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN S. HOGG, ESQ.,
of counsel
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PLAINTIFF-APPELLANT'S BRIEF

ORIGINAL

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PRINCIPAL RULES INVOLVED

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 54. Judgments; Costs

***

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than

all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one days' notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

***

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good case shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

***

Rule 60. Relief from Judgment or Order

***

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notifed as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

IN THE
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ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,
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-vs-

WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,
Defendants-Appellees.

PRELIMINARY STATEMENT

This is an appeal, consolidated by Order of this Court, Hon. Thomas J. Meskill, C.J., from a default judgment entered against the plaintiff and in favor of the defendant herein upon its counterclaim by order of Hon. Edward Weinfeld, D.J.; and from an order of Hon. Edward Weinfeld, D.J. September 24, 1975, denying plaintiff's motion for relief from the aforesaid judgment pursuant to Rule 60 (b) FRCP.

STATEMENT OF ISSUES PRESENTED

The issues presented on this appeal are:

1. Whether the District Judge had the power

to condition relief from plaintiff's default under FRCP 55 (c) the posting of a bond in the amount of $25,000.00.

2. Whether the District Judge was in error in making a certification to permit entry of a final judgment under FRCP 54 (a) upon the counterclaim herein while the trial of this action upon the same issues is pending.

3. Whether the District Judge ought to have set aside the judgment under Rule 60 (b) on the ground that its operation would interfere with the prompt and orderly disposition of this action.

STATEMENT OF THE CASE

This appeal arose out of an action for breach of contract brought by Ismael Abu Khadra, d/b/a The Middle East Electro-Mechanical Corporation, a resident of Saudi Arabia, against Westinghouse Electric Corporation and Westinghouse Electric International, S.A., for breach of contract. The defendant Westinghouse International S.A., has not been served and is therefore not a party to the present proceeding.

The complaint, very briefly summarized, alleges that plaintiff and defendant entered into an agreement by which defendant undertook to supply certain specified goods within a specified time; that defendant purported to deliver certain goods, but that said goods were not manufactured in accordance with specification or were not timely delivered, resulting in substantial, direct and consequential damages to the plaintiff (A5-10).

The action was brought in the Supreme Court of the State of New York in Onondaga County.

On October 21, 1974, defendant Westinghouse Electric Corporation (hereinafter "defendant") filed a petition for removal of this action to the United States District Court for the Northern District of New York.

On October 25, 1974, defendant filed an answer containing a counterclaim alleging, in substance, that goods had been delivered in accordance with the agreement between the parties and demanding payment therefor.

On November 1, 1974, defendant made a motion

to transfer the action from the Northern District of New York to the Southern District of New York.

On November 6, 1974, defendant filed an amended answer, containing the same counterclaim.

On November 25, 1974, Hon. Charles L. Brieant, Jr., D.J., granted defendant's motion to transfer the action to the Southern District of New York. (Record, Document 1)

Shortly after service of the amended counterclaim herein George T. Mahshie, Esq., attorney for plaintiff, dictated to a secretary a reply to the counterclaim for preparation, filing and service herein. For reasons which cannot be explained, no such reply was ever served.

At no time was Mr. Mahshie made aware of the failure to serve a reply to the counterclaim, either by the proper operation of his office system, or by way of inquiry by any of the various attorneys representing and appearing for defendant, until the service of a motion for judgment upon a default that had been entered (A. 26-27). Thereafter, plaintiff made a cross-

motion under FRCP 55 (c) to set aside the default which had been entered by defendant without notice to plaintiff, on the ground that plaintiff's failure to file a reply was due to inadvertence or to excusable neglect, and that a judgment of over $100,000.00 involving the same matters at issue in the main action ought not to be determined by entry of a default judgment; and sought leave to serve a reply to the counterclaim (A24-27).

The District Judge denied defendant's motion for a default judgment and granted plaintiff's cross motion, but conditioned both decisions upon the plaintiff's posting a bond in the amount of $25,000.00 within 20 days (A23, 31).

Plaintiff did not post the bond demanded by the District Court within twenty days. Because of the vagaries of postal, telegraphic and telephone communication with Saudi Arabia where the plaintiff lives, plaintiff's counsel was actually unable to communicate within the 20 day period allotted to determine whether it would be possible to put up such a bond (A 53-55).

Subsequently, however, when plaintiff came to the United States for the purpose of giving a deposition in this matter,he made an affidavit showing that as a result of defendant's breach of contract, he is insolvent and financially unable to post the bond which the Court had required. (A58-60).

Based upon the fact that his insolvency prevented the posting of such a bond, plaintiff moved to modify the court's order by removing the requirement for a bond. Prior to the return date of this motion, however, a motion made by defendant for default judgment based on plaintiff's failure to post a bond came on to be heard before the District Judge, and plaintiff's counsel moved orally for a one week adjournment to permit hearing of the motion to excuse the condition of the bond, on the ground of plaintiff's insolvency. The Judge from the bench denied this motion and granted defendant's motion for a default judgment (A52, 79). In view of the fact that the judgment superseded the earlier orders, the motion to modify the order was with-

drawn (A62, 63, 79).

Plaintiff received no notice of the entry of judgment, but after discovery upon inquiry that a final judgment had been entered (A-86), made a motion under FRCP 60 (b) to set aside the judgment on the ground that it had been improperly granted and that it would improperly interfere with the orderly disposition of the action (A67-68).

While decision on said motion was pending, an appeal was taken from the default judgment to this Court (A92.). Thereafter, plaintiff's motion for relief under FRCP 60 (b) was denied (A74) and plaintiff took an appeal from that deicision (A93).

Because both appeals involve substantially the same issues, they have been consolidated into a single appeal by order of this Court (A94.)

ARGUMENT

I, THE DISTRICT COURT WAS WITHOUT AUTHORITY TO CONDITION RELIEF FROM PLAINTIFF'S DEFAULT UPON THE POSTING OF A $25,000.00 BOND.

Upon the defendant's motion for default judgment on the counterclaim and plaintiff's cross

motion for relief from the default under FRCP 55 (c), the District Judge made orders denying the entry of default judgment and granting the motion for relief under FRCP 55 (c). This, in and of itself, was a correct decision and in accord with the overwhelming weight of precedent, holding uniformly to the proposition that where a default is neither wilfull or harmful to the opposing party, it ought to be set aside upon timely motion.

A recent District Court decision summarizing the law and authorities on this point said:

> "Courts look upon default judgment with disfavor, and therefore, motions to set aside default judgments are considered liberally. Tozer v. Charles A. Krause Milling Co., 189 F 2d 242 (3d Cir. 1951); Residential Reroofing Union Local 30-B v. Mezicco, 55 F.R.D. 516 (E.D.Pa. 1972). Where default has been entered, but default judgment not yet granted, an even more liberal standard is applied to a motion to set aside the entry of default. See generally Wright and Miller, Federal Practice and Procedure, Section 2694. F.R. Civ. P. 55 (c) provides that an entry of default may be set aside "for good cause shown." This provision vests in the Court a broad discretion to set aside an entry of default in order to accomplish justice. Stuski v. United States Lines, 31 F.R.D. 188 (E.D.Pa. 1962). Cf. Klapprott v. United States, 335 U.S. 601, 614, 69 S. Ct. 384, 93 L.Ed. 266 (1949). In Particular,

> a Rule 55 (c) motion may be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a willful act. Tozer v. Charles A. Krause Milling Co., supra. See generally Wright and Miller, Federal Practice and Procedure, Section 2696."

Schartner v. Copeland, 59 FRD 653 (E.D. Pa. 1973) affirmed without opinion 487 F 2d 1395.

In an earlier case involving the failure of a plaintiff's attorney to file a reply to a counterclaim, the decision of the Court of Appeals, Fourth Circuit,held:

> "The seriousness of the neglect, if any, was not great, and there is nothing in the record to suggest that defendant suffered any prejudice from the delay, other than giving up the judgment by default to which she thought she was entitled. In this regard we note that plaintiff alleged in his complaint that the sole proximate cause of the accident was defendant's decedent's negligence. If established at trial this would constitute a complete defense to the counterclaim. Thus, one of plaintiff's intended defenses to the counterclaim had already been pleaded; the answer sought to be filed would have repeated it more formally as well as allege the affirmative defense of release."

Tolson vs. Hodge, 411 F 2d 123, 130. (CA4, 1969). Note that in its essentials, substituting contract language for negligence, the situation here is a precise parallel to that in Tolson. The Court went on to summarize the present state of the law:

> "It has been held in an extensive line of decisions that Rules 55 (c) and 60 (b) are to be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments. [citing cases]. Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits. Hutton v. Fisher, 359 F. 2d 913, 916 (3 Cir. 1966) (reversing denial of relief below). A leading authority is Tozer v. Charles A. Krause Milling Co., 189 F. 2d 242, 245-246 (3 Cir. 1951) (reversing denial of relief below), in which the court noted, inter alia, that 'the interests of justice are best served by a trial on the merits' and that, therefore, it is 'proper for the court to consider whether any prejudice will result to plaintiff if judgment is set aside.'"

The Tozer case cited by the Court, in reversing the District Court for refusing to open a default judgment, expressed the applicable policy consideration very succinctly:

> "The recent cases applying Rule 60 (b) have uniformly held that it must be given a

liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Henry v. Metropolitan Life Ins. Co., D.C.Va., 1942, 3 F.R.D. 142, 144. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. (Citing Cases) Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments."

/Emphasis Supplied/ 189 F 2d 242, 245.

However, in the present case, the Court did not stop at that point, but went on to condition the denial of defendant's motion and the granting of plaintiff's motion upon the filing by plaintiff, within 20 days, of a bond of $25,000.00. The grounds upon which such an extraordinary condition was demanded were not stated, and indeed, the Judge's order did not even prescribe what the condition of the bond might be. (Since defendant had demanded a bond to secure payment of any judgment it might obtain (A-40) that may have been the intended condition.)

Diligent search of the precedents by counsel for plaintiff has not disclosed a single case in which such a bond was imposed as a condition for

relief under Rule 55 (c). Certainly, the Judge cited none, and no such case was referred to by defendant below. It must be noted that Rule 60 (b) making provision for relief from default judgments, provides that relief be given "upon such terms as are just; but for relief from a default which has not been reduced to judgment, Rule 55 (c) makes no such provision. Of course, the advisory committee's notes to Rule 55 (c) point out that the discretion of the judge is derived from equity rules, and the omission from Rule 55 (c) of any special reference to terms upon which relief may be granted, does not deprive the court of its inherent powers. Nevertheless, no reported case seems to note the exercise of such a power and it would appear that no such power ought or can be exercised without a strong showing of a factual situation which requires the protection of the party by such an extraordinary condition.

There have been some cases involving relief from a previously entered judgment, under Rule 60 (b) where bonds or undertakings have been

required as a condition of relief. As far as appears from a study of the cases, such bonds have been sustained on two theories, but never simply to secure collection of the judgment.

Where, as a result of the entry of a default, the party who entered the default has acquired some sort of actual property right by way of costs, execution or otherwise, the courts have in many cases conditioned relief from the default upon securing the rights which the party had already obtained. For example, before the adoption of the FRCP, in E.W. Montgomery Co. v. Gwin, 58 F 2nd 779 (N.D. Miss. 1932) the court allowed a bond securing costs to which the party would have been entitled if a judgment had been entered and vacated. In Wokan v. Alladin International Inc., 485 F 2nd 1232-1235 (3rd Cir 1973) the court said:

> "We think it perfectly proper for a district court in an appropriate case to impose the condition to vacating a default judgment that the judgment holder not be deprived of any payment or security he has obtained as a result of the judgment."

More frequently reported, are cases where the Court has required, as a condition of relief from default, that the defaulting party secure or make good the costs and expenses which have been caused to the other party by the circumstances of the default. For example, Flaksa v. Little River Marine Construction Co., 389 F 2nd 885 (5th Cir. 1968) imposed costs as a condition of relief from a default; and the court in Trueblood v. Grayson Shops of Tenn., Inc., 32 FRD 190 (D.C. Va. 1963) calling the tactics of the defendant in causing delay and expense "unparalleled", vacated the default judgment only after payment by the defendant of the taxable costs, costs of the deposition which was the subject of the delay and $2,000.00 attorney fees and expenses.

Evidently, the facts in this case would not justify the application of these principles. At all times, from the moment plaintiff's attorney was aware of the inadvertent default in filing a reply to defendant's counterclaim, he has been and remains willing and anxious to serve the reply. No costs or expense of any kind are

attributable to the default. It is apparent that all of the proceedings; the entry of the default; the motion for a default judgment; the cross motion for relief under Rule 55 (c); the second motion for a default judgment; the motion to modify the orders to eliminate the requirement of a bond; the entry of the judgment; the motion under Rule 60 (b); and these appeals; might have been avoided and prevented in advance, had any of defendant's successive counsel troubled to make inquiry of plaintiff's attorney; and all of the delay and expense of the proceedings could have been simply avoided but for defendant's intransigence and insistence upon getting something for nothing.

The fact here is that the defendant has sustained literally no prejudice whatsoever by reason of default; there has been no delay in the proceedings caused by the default; there has been no expense caused by the default; all of the expense and delays which have followed the inadvertent failure to file a reply have been

imposed and instigated by defendant itself.

It is probably unnecessary to belabor this point, because in none of the papers filed herein has defendant even attempted to allege any prejudice or inconvenience to it resulting from the default. Defendant's moving papers allege, in sum, that plaintiff is insolvent; that by reason of his insolvency, in the event that defendant ultimately obtains a judgment upon its counterclaim, that counterclaim may not be collectable.

Quite so. As in any litigation that is at issue, there is no assurance to either party in the pleading stage that a judgment can be obtained; or that, if obtained, it is collectable. It is not apparent what special quality resides in the defendant to assure it a right that no other defendant or plaintiff has ever had before.

In Wokan v. Alladin International, Inc., supra, a part of the default judgment had been paid; but as a condition to relieving the party from its default, the District Court imposed a

bond to secure the unsatisfied portion of the judgment. The court said:

> "We think it perfectly proper for a District Court in an appropriate case to impose the condition to vacating a default judgment that the judgment holder not be deprived of any payment or security he has obtained as result of the judgment. But, it is difficult to imagine what set of circumstances would justify the imposition of a condition that the now disputed claim be made more secure than it was prior to the Court's action on the Rule 60 (b) motion. There may be such circumstances, but they do not appear in this record." 485 F 2d, 1235.

Similarly, in Thorpe v. Thorpe, 364 F 2nd 692 (D.C. Cir. 1966), the Court of Appeals, reversing a district court decision which similarly secured to the plaintiff an amount in excess of what had been obtained by the plaintiff by the default judgment, held that:

> "When such an extraordinary condition is approved it must be accompanied by supporting findings to show that it represents a reasonable exercise of discretion." 346 F 2nd 695.

Here, of course, there are no findings.

Finally, the imposition of a $25,000.00 bond as a condition to the plaintiff's obtaining relief raises, under the circumstances, a serious constitutional issue. As was alleged in the

defendant's first motion for a default judgment and as was clearly shown by the plaintiff's own affidavit, the plaintiff is insolvent and incapable of obtaining a bond in the amount of $25,000.00.

The provisions of Title 28 of the United States Code and of the Federal Rules of Civil Procedure open the courts of the United States to persons who claim a right to relief as therein provided. There is nowhere in the Rules or the Code a provision requiring a plaintiff to post a bond to secure his opponent's possible judgment as a condition to obtaining relief in a simple contract action. Certainly there is no case authority imposing such a condition. The same issue was present in Thorpe v. Thorpe, supra, where the Court said:

> "If appellant's claim that he simply is unable to comply with the condition imposed is true, serious questions are raised, questions having an aura of denial of due process of law. (See Societe Internationale, etc. v. Rogers, 357 US 197, 209-210, 78 S. Ct. 1087, 2 L.Ed 2d 1255 (1958) where the Supreme Court stated, in another context, that imposition of an 'impossible condition' on a litigant's right to a trial on the merits raises constitutional difficulties." 364 F 2nd 695.

Where an evidently insuperable barrier is imposed between plaintiff and his right to have his cause of action and his defense to the counterclaim, heard upon the merits it clearly comes within this constitutional area and clearly deprives plaintiff of his rights and of his property without legal justification. Because the requirement of the bond was imposed without legal justification, the entry of judgment based upon the failure to post such a bond clearly is erroneous and ought to be reversed.

II. THE DISTRICT COURT WAS IN ERROR IN ENTERING A FINAL JUDGMENT BY DEFAULT UPON COUNTERCLAIM WHILE THE SAME ISSUES ARE PENDING BEFORE THE COURTS IN THE SAME CASE.

The entry of a final judgment by default upon a counterclaim in a case where the issues are being litigated appears to be wholly unprecedented. The complaint alleges the failure of defendant to deliver goods in accordance with the contract between plaintiff and defendant; the couterclaim alleges delivery of such goods in accordance with the contract. In such circumstances, the failure

of plaintiff to serve a reply is a very technical default because the complaint does, in fact, put the counterclaim in issue. The situation is the same as that referred to in Tolson v. Hodge, supra, and ought to be governed by the same rules.

Since both the claim of the plaintiff and the claim of defendant clearly arise out of the same transaction, a contract, for delivering the same goods, it is evident that the counterclaim is a compulsory one under FRCP 13 (a). The apparent purpose of requiring compulsory counterclaims is to enable the disposition of all related issues at a single trial. This purpose is, of course, frustrated by the entry of a final judgment on the counterclaim.

It would appear to be, at least in part, to prevent this that the amendment of Rule 54 (b) was introduced requiring a final judgment not be entered unless the judge can express determination that there is no just reason for delay. It may well be that the absence of precedents relating to the entry of default judgments on counterclaims results from the very fact that the

adherence of the courts to the considerations embodied in Rule 54 (b) has prevented entry of judgment by default or otherwise on counterclaims which are so closely tied to the main claim.

The settled rule seems to be that such orders under Rule 54 (b) "should not be entered routinely or as a courtesy or accomodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation ***" Panichella v. Pennsylvania R.R., 252 F 2nd 452, 455 (3rd Cir. 1958).

Citing Panichella, the Court in Columbia Broadcasting System, Inc., v. Amana Refrigeration, Inc., 271 F 2nd 257 (7th Cir. 1959) said:

> "The prosecution of an appeal from the order***serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation." 271 F 2d 259.

That is certainly true in this case, more

especially because of the close relationship between issues in the complaint and in the counterclaim.

In the case of Gaetano Marzotto & Figli S.P.A. v. G.A. Vedovi & Co., 28 FRD 320 (SDNY 1961), the Court summarized the position of the Supreme Court of the United States on this issue, saying:

> "The problem posed here, however, relates not so much to a possible abuse of discretion by the district court but as to whether its discretion under Rule 54 (b) should be exercised in favor of making an express determination that there is no just cause for delay and an express direction that a final judgment should now be entered.
>
> In this connection, as the court pointed out in Cold Metal Process Co. v. United Engineering & Foundry Co., supra, 351 U.S. at page 452,76 S. Ct. at page 909, '***under the amended rule, the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion.' In Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436, 76 S. Ct. 895, 900, 100 L. Ed. 1297, (decided at the same time as the Cold Metal case), it is indicated that where the claim on which final judgment is sought under Rule 54 (b) is 'inherently inseparable from, or closely related to' the claims still pending, a certification by the district court that there is no just cause for delay and that final judgment should be entered might well be an abuse of its discretion."

28 F.R.D. at 323-24.

In any event, it is not apparent why the Rule 54 (b) certification was made in this case, since the District Judge made no decision, and the Judgment recites simply a bald certification in the language of the Rule.

It is respectfully submitted that if there is, in fact, no just reason for delay, the District Judge ought to have made findings to support this decision, as this Court has suggested in Schwartz v. Compagnie General Transatlantique, 405 F 2d 270, 275 (2d Cir. 1968); Gumer v. Shearson, Hammill & Co. Inc., 516 F 2nd 283, 286 (2nd Cir. 1974). Absent "some danger of hardship or injustice through delay which would be alleviated by immediate appeal". (Campbell v. Westmoreland Farm, Inc., 403 F 2d 939, 942 (2d Cir. 1968)), there is no justification for the certification.

While it seems that the Section 54 (b) certificate, under the authorities, was improvidently granted, it is submitted that this Court is not thereby deprived of jurisdiction to adjudicate

the merits of this consolidated appeal. Since even if the judgment itself was not final, the decision of the District Judge upon the Rule 60 (b) motion in the belief that a final judgment had been entered on the counterclaim, is itself a final order, upon which the jurisdiction of this Court can be based, so that this Court may make an adjudication on the merits of this consolidated appeal.

III. THE JUDGMENT OUGHT TO HAVE BEEN SET ASIDE UNDER RULE 60 (b) (6) BECAUSE THE OPERATION OF THE JUDGMENT WOULD NECESSARILY BE TO INTERFERE WITH THE PROMPT AND ORDERLY DISPOSITION OF THE ACTION.

FRCP Rule 1 directs that the Federal Rules of Civil Procedure shall be construed to secure the just, speedy and inexpensive determination of the action. The entry of a default on the counterclaim herein has had the obvious effect of delaying the disposition of this case, as well as greatly increasing its expense to the parties. Furthermore, unless the judgment is reversed and the default of plaintiff excused, the effect of the judgment will be directly to prevent the just

disposition of this action.

It is well settled, under both Federal and New York Law, that a default judgment is conclusive in the same manner as a judgment after trial. "A judgment of a court having jurisdiction of the parties and of the subject matter, operates as res judicata in the absence of fraud or collusion, even if obtained upon a default", Riehle v. Margolies, 279 U.S. 218, 225; Morris v. Jones, 329 U.S. 545, 551.

> "***/J/udgment rendered by a court having competent authority to deal with the subject matter involved in the action, and jurisdiction of the parties, is final and conclusive between them.***
> The present case is within the general rule that a judgment is conclusive between the same parties***upon all matters embraced within the issue in the action, and which were or might have been litigated therein. It is immaterial whether issue was joined by the defendant or tendered by the plaintiff and left unanswered. The rule applies as well to a judgment by default when the facts stated warrant the relief sought as to one rendered after contest***."

Goebel v. Iffla, 111 N.Y. 170 (1888); Mitchell v. INA, 40 AD 2d 873 (2nd Dept. 1972).

The defendant's counterclaim sounds in contract for goods sold and delivered. Necessary to

support a judgment upon this counterclaim, would be proof of performance of the contract and compliance with its conditions. United Interchange, Inc. v. Aragoni, 17 A.D. 2d 1004 (1962); Fairbanks Whitney Corp. v. Sarlie, 31 Misc. 2d 892 (1961).

Thus, the existence of a final judgment in favor of defendant on the counterclaim will, under settled principles of law, be conclusive as between the parties that defendant performed and complied with the conditions of its contract with the plaintiff. Plaintiff will then be precluded from proving the breach of contract which is the gravamen of his complaint. Thus, the effect of the default judgment is, in fact, to bar the plaintiff's complaint and put him, for all practical purposes, totally out of court.

For this reason, above all, plaintiff's motion to set aside the judgment under Rule 60 (b) ought to have been granted.

The trivial and harmless nature of the default, when compared with the disastrous effect of the operation of the judgment, should have left the

court below no alternative but to set the judgment aside, and permit the action to proceed on the merits.

CONCLUSION

It is submitted that here an admitted regrettable default, which has never caused the slightest harm or prejudice to the defendant has been converted, through the insistence of the defendant on its pound of flesh at every state, into what amounts to virtual total destruction of the plaintiff's cause of action. The mechanism of this metamorphosis has been particularly inequitable in that relief has been dangled before the plaintiff, at a price which the plaintiff has been wholly unable to meet as a direct result of his insolvency alleged to have been created by the defendant's own breach of contract.

Appellant therefore prays the Court to set aside the default judgment entered upon the counterclaim herein and grant plaintiff leave to file a reply, together with the costs and disbursements of this appeal; and it is respectfully prayed that

this Court give consideration to whether the defendant ought equitably be required to be responsible for the costs of the extensive and unnecessary proceedings which have been had in connection with the default, leading to the delay, costs, expenses and ultimate inconvenience to the parties and to this Court of this appeal.

Respectfully submitted,

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Received two (2) copies of written brief.

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